Supreme Court, U.S.
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IN THE UNITED STATES SUPREME COURT
OCTOBER TERM 1997

SHELL OFFSHORE INC.
Petitioner
v.
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR; FERNON GILLIAM
Respondents

and

SHELL PIPE LINE CORP.
Petitioner
v.
LEE H. CAFIERO; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI OF SHELL OFFSHORE INC. AND SHELL PIPE LINE CORP.

Jeffrey I. Mandel - Counsel of Record
LARZELERE & PICOU, L.L.P.
3850 N. Causeway Blvd., Suite 1100
Metairie, Louisiana 70002
(504) 834-6500

40 pp

QUESTION PRESENTED FOR REVIEW

1. Whether the Omnibus Appropriations for Fiscal Year 1996 Act, Public Law 104-134, Title I, §101(d) [Title I], April 26, 1996, 110 Stat. 1321, which precluded the Benefits Review Board, United States Department of Labor, from reviewing any appeal that was pending before it for greater than one year as of September 12, 1996, violated Shell Offshore Inc. and Shell Pipe Line Corporation's rights to due process of the law under the Fifth Amendment to the United States Constitution, by precluding Shell from having a meaningful opportunity to be heard.

LIST OF PARTIES AND DESIGNATION OF CORPORATE RELATIONSHIPS

The named appellants in the court of appeals and the petitioners herein are Shell Offshore Inc. and Shell Pipe Line Corporation. The named appellees in the court of appeals and the respondents herein are Lee H. Cafiero, Fernon Gilliam, and the Director, Office of Workers' Compensation Programs, United States Department of Labor. Shell Offshore Inc. and Shell Pipe Line Corporation are wholly owned subsidiaries of Shell Oil Company.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

LIST OF PARTIES AND DESIGNATION OF CORPORATE RELATIONSHIPS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

CITATIONS OF OPINIONS/ORDERS 1

CONCISE STATEMENT OF JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN CASE 3

CONCISE STATEMENT OF CASE 5

ARGUMENT. 6

A. Congress Did Not Repeal Section 921 of the LHWCA Through the Appropriations Act. 7

B. Congress Denied Shell Due Process of Law By Precluding the BRB From Reviewing These Appeals on Their Merits. 10

1. The Right of Due Process Still Exists in Section 921. 10

2. The Fifth Circuit Failed to Follow Its Precedent. 12

CONCLUSION. 14

APPENDIX

A. Opinion of the United States Court of Appeals for the Fifth Circuit dated September 24, 1997. . . . . 1a

B. Notice From the Clerk of the Benefits Review Board dated September 12, 1996 (*Cafiero* claim) 13a

C. Notice From the Clerk of the Benefits Review Board dated September 12, 1996 (*Gilliam* claim) 15a

D. Order of the United States Court of Appeals for the Fifth Circuit denying Petition for Rehearing and Suggestion for Rehearing En Banc dated December 10, 1997 . . . . . 17a

TABLE OF AUTHORITIES

Cases

Abbott v. Louisiana Ins. Guar. Ass'n (In Re Compensation Under the Longshore and Harbor Workers' Compensation Act), 889 F.2d 626 (5th Cir. 1989) 12,13

Bunol v. George Engine Co., 996 F.2d 67 (5th Cir. 1993) 13

Foreman v. United States, 60 F.3d 1559 (Fed. Cir. 1995) 8

Kreschollek v. Southern Stevedoring Co., 78 F.3d 868 (3d Cir. 1996). 12

Mathews v. Eldridge, 424 U.S. 319 (1976) 10-11

Meehan Seaway Service Co. v. Director, Office of Workers' Compensation Programs, 4 F.3d 633 (8th Cir. 1993) 12

Robertson v. Seattle Audubon Society, 503 U.S. 429 (1992). 8

Shell Offshore Inc. v. Director, Office of Workers' Compensation Programs, 122 F.3d 312 (5th Cir. 1997) 13

Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978). . 7, 8, 10

(Cases, cont.)
United States v. Will, 449 U.S. 200 (1980) 8

Vincent v. Consolidated Operating Co., 17 F.3d 782 (5th Cir. 1994) 12, 13

Constitution, Statutes, and Rules

Unites States Constitution, Amendment V 3

Federal Rule of Appellate Procedure 40(a). 2

Omnibus Appropriations for Fiscal Year 1996 Act. 3, 5, 9

Omnibus Consolidated Appropriations Act, 1997 6

28 U.S.C. §1254 2

33 U.S.C. §901, et seq. 3, 5

33 U.S.C. §921 . . . . . .5, 8, 9, 11

33 U.S.C. §921(b)(3) 9

33 U.S.C.A. §921 (West Supp. 1997) 4, 5, 6

House of Representatives Rule XXI(2) 8

Senate Standing Rule XVI(4) 8

CITATIONS OF OPINIONS AND ORDERS OF COURTS BELOW

Benefits Review Board - unpublished

Cafiero v. Shell Pipe Line Corporation, BRB No. 94-2654 (September 12, 1996)(reprinted in the Appendix at 13a)

Gilliam v. Shell Offshore Inc., Case No. 93-1758 (September 12, 1996)(reprinted in the Appendix at 15a)

United States Court of Appeals for the Fifth Circuit

Shell Offshore Inc. v. Director, Office of Workers' Compensation Programs, 122 F.3d 312 (5th Cir.1997) (reprinted in the Appendix at 1a)

CONCISE STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its decision in these consolidated appeals on September 24, 1997. Thereafter, Shell filed a timely Petition for Rehearing En Banc on November 10, 1997.[1] The Fifth Circuit denied Shell's Petition for Rehearing En Banc on December 10, 1997.

This Honorable Court has jurisdiction over these consolidated appeals pursuant to 28 U.S.C. §1254.

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[1] The United States Department of Labor is a party to these appeals. Therefore, pursuant to Federal Rule of Appellate Procedure 40(a), Shell had 45 days in which to file its Petition for Rehearing En Banc.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN CASE

1. *FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION*

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

2. *OMNIBUS APPROPRIATIONS FOR FISCAL YEAR 1996 ACT*, Public Law 104-134, Title I, §101(d) [Title I], April 26, 1996, 110 Stat. 1321[2]

Provided further, That no funds made available by this Act [Department of Labor Appropriations Act, 1996] may be used by the Secretary of Labor after September 12, 1996, to review a decision under the Longshore and Harbor Workers' Compensation Act [hereinafter "LHWCA"]...that has been

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[2] Only the relevant portion of the Appropriations Act, as concerns the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901, et seq., is set forth herein.

appealed and that has been pending before the Benefits Review Board [hereinafter "BRB"] for more than 12 months, except as otherwise specified herein: Provided further, That any such decision pending a review by the [BRB] for more than one year shall, if not acted upon by the Board before September 12, 1996, be considered affirmed by the [BRB] on that date, and shall be considered the final order of the Board for purposes of obtaining a review in the United States courts of appeals: Provided further, That beginning on September 13, 1996, the [BRB] shall make a decision on an appeal of a decision under the [LHWCA]...not later than 1 year after the date the appeal to the [BRB] was filed; however, if the [BRB] fails to make a decision within the 1-year period, the decision under review shall be considered the final order of the Board for purposes of obtaining a review in the United States courts of appeals[.] * * * Beginning on September 13, 1996, in any appeal to the [BRB] that has been pending for one year, the petitioner may elect to maintain the proceeding before the [BRB] for a period of 60 days. * * * If no decision is rendered during this 60-day period, the decision under review shall be considered affirmed by the Board on the last day of such period, and shall be considered the final order of the Board for purposes of obtaining a review in the United States courts of appeals.

33 U.S.C.A. §921 (West Supp. 1997).

CONCISE STATEMENT OF THE CASE

Fernon Gilliam filed a claim for compensation benefits pursuant to the Longshore and Harbor Workers' Compensation Act (hereinafter "LHWCA"), 33 U.S.C. §901, et seq., against Shell Offshore Inc. Several years later, Lee Cafiero filed a claim for compensation benefits pursuant to the LHWCA against Shell Pipe Line Corporation.[3] Both claims proceeded to formal hearing before two different administrative law judges. Following the issuance of unfavorable decisions, Shell filed timely appeals in each claim with the Benefits Review Board (hereinafter "BRB"), pursuant to 33 U.S.C. §921.[4]

During the pendency of the above appeals before the BRB, the United States Congress enacted the Omnibus Appropriations for Fiscal Year 1996 Act, Public Law 104-134, Title I, §101(d) [Title I], April 26, 1996, 110 Stat. 1321 (hereinafter "Appropriations Act").[5] The Appropriations Act precluded the BRB from expending any funds for the review of any appeal that had been pending before it for greater than one year as of September 12, 1996. 33 U.S.C.A. §921 (West Supp. 1997). After September 12, 1996, the BRB could not expend any funds for review of any appeal pending before it

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[3] For ease of reference, both Shell Offshore Inc. and Shell Pipe Line Corp. will be referred to collectively as "Shell" herein.

[4] Shell filed its appeal in the *Gilliam* claim on June 15, 1993, and filed its appeal in the *Cafiero* claim on June 23, 1994. As of September 12, 1996, the BRB had not rendered a decision in either claim.

[5] The relevant portion of the Appropriations Act, as concerns the LHWCA, may be found at 33 U.S.C.A. §921 (West Supp. 1997).

for one year. *Id.* Congress since has re-enacted the Appropriations Act, thus continuing its affect on the procedural due process rights of those parties appearing before the BRB.[6]

Shell does not seek review of the substantive claims in either of these consolidated appeals in the current Petition for Writ of Certiorari.

ARGUMENT

These consolidated appeals present a compelling reason for this Honorable Court to grant certiorari. The United States Court of Appeals for the Fifth Circuit has decided an important question of federal law that has not been, but should be, settled by this Honorable Court. Specifically, the Fifth Circuit has sanctioned Congress's denial of due process under the Fifth Amendment of the United States Constitution by denying Shell its statutory and constitutional right to be heard in a meaningful manner. In so ruling, the Fifth Circuit failed to follow its own precedent on the issue of procedural due process under the LHWCA.

This Honorable Court should grant certiorari in these consolidated appeals to consider whether Congress had the right to amend the LHWCA through an appropriations measure and whether the Appropriations Act impinged upon Shell's due process rights.

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[6] *See* Omnibus Consolidated Appropriations Act, 1997, Public Law 104-208, September 30, 1996, 110 Stat. 3009.

A. CONGRESS DID NOT REPEAL SECTION 921 OF THE LHWCA THROUGH THE APPROPRIATIONS ACT

This Honorable Court long ago announced the "cardinal rule" that "repeals by implication are not favored." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 189 (1978) (quoting *Morton v. Mancari*, 417 U.S. 535, 549 (1974) (quoting *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936)). Congress must express an affirmative showing of an intention to repeal, "the only permissible justification for a repeal by implication [being] when the earlier and later statutes are irreconcilable." *Id.* at 190 (quoting *Mancari*, 417 U.S. at 550). This policy applies "with *greater* force when the claimed repeal rests solely on an Appropriations Act." *Id.* (emphasis in original).

This policy is based on the practicalities inherent in the legislative process. As this Court explained in *Hill*:

> "When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are *lawful and not for any purpose forbidden.*"

Id. at 190. Should the legislators be denied the ability to do so, it would "lead to the absurd result of requiring Members to review exhaustively the background of every authorization before voting on an appropriation" and "would flout the very

rules the Congress carefully adopted to avoid this need."[7] *Id.* at 190-91 (emphasis added).

Notwithstanding the above policy, Congress certainly may suspend or repeal a statute through an appropriations measure. *United States v. Will*, 449 U.S. 200, 222 (quoting *United States v. Dickerson*, 310 U.S. 554, 555 (1940)). "The whole question depends on the intention of Congress as expressed in the statutes." *Id.* (quoting *United States v. Mitchell*, 109 U.S. 146, 150 (1883)). Should Congress desire to repeal a substantive statute through an appropriations measure, it must do so clearly. *Robertson v. Seattle Audubon Society*, 503 U.S. 429, 440 (1992).

Finally, "where a later statute 'covers the whole situation of the earlier one and is clearly intended as a substitute', then the later act operates as a repeal." *Foreman v. United States*, 60 F.3d 1559, 1563 (Fed. Cir. 1995) (quoting *Randall v. Loftsgaarden*, 478 U.S. 647, 661 (1985) (quotation omitted)).

Congress has not expressed an affirmative showing of an intention to repeal Section 921 of the LHWCA through the Appropriations Act. Nor did Congress cover the "whole situation" of Section 921 in the Appropriations Act. Section 921 of the LHWCA provides, in part:

> The [BRB] shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by a party in interest from

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[7] *See* Senate Standing Rule XVI(4) and House of Representatives Rule XXI(2). *See also United States v. Will*, 449 U.S. 200, 222 (1980).

> decisions with respect to claims of employees under [the LHWCA] and the extensions thereof. ***The [BRB's] orders shall be based upon the hearing record.***

33 U.S.C. §921(b)(3) (emphasis added).

As reflected in the Appropriations Act, *supra*, Congress retained the requirement that the BRB review appeals pending before it based on their merits, *i.e.*, the hearing record. Shell submits that the BRB review is a significant component of the post-deprivation review process statutorily granted in the LHWCA, as discussed more fully below. Congress, through the Appropriations Act, merely placed a time limitation on this due process right. Congress ***did not*** clearly repeal Section 921 of the LHWCA. Further, Section 921 and the Appropriations Act are not irreconcilable. Rather, Congress merely, unconstitutionally, suspended Section 921 for those claims which had not been reviewed by the BRB, and which had been pending before the BRB for greater than one year, as of September 12, 1996.

No legislative history exists concerning Congress's consideration of the Appropriations Act. As such, no support could be located for the proposition that the members of Congress knew what effect the Appropriations Act would have on parties' constitutional and statutory rights before the BRB. Shell submits that it is reasonable to believe that a majority of the members of Congress are not well-versed on the LHWCA and its statutory right to have an appeal reviewed by the BRB on the merits of the claim. Moreover, in the words of this Honorable Court, it would be "absurd" to require each member of Congress to exhaustively review each provision of Appropriations Act prior to approval to

determine the effect the Appropriations Act would have on Section 921 of the LHWCA.

Therefore, while Congress had the right to repeal or suspend Section 921 of the LHWCA through the Appropriations Act (*i.e.*, it could have precluded the BRB from expending any funds to review ***any*** appeal) Congress did not do so in this case. Further, and in the alternative, if it is determined that Congress repealed or suspended Section 921 of the LHWCA, it could not do so in violation of the Fifth Amendment, *i.e.*, an unlawful means or for a purpose forbidden. *Hill*, 437 U.S. at 190.

In this case, Congress ***did*** attempt to use an appropriations act for an unlawful means or for a purpose forbidden - - to deny parties their due process rights to have their appeals reviewed by the BRB on the merits of their cases. The policy against repeals by implication should be applied with great force in this instance, due to the actions taken by Congress through the Appropriations Act. Therefore, this Honorable Court should grant certiorari to review whether Shell's due process rights were violated by the enforcement of the Appropriations Act.

B. CONGRESS DENIED SHELL DUE PROCESS OF LAW BY PRECLUDING THE BRB FROM REVIEWING THESE APPEALS ON THEIR MERITS

1. The Right of Due Process Still Exists in Section 921

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process

Clause of the Fifth . . . Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

> The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time ***and in a meaningful manner***.'

Id. at 333 (emphasis in original)(quotation omitted). Such is the foundation for consideration of any procedural due process inquiry.

Congress, through the Appropriations Act, denied Shell its opportunity to be heard in a meaningful manner. As such, Congress denied Shell its "liberty" and "property" interests protected by the Fifth Amendment of the United States Constitution. By operation of the Appropriations Act, these consolidated appeals were affirmed by the BRB ***not*** on the hearing record, *i.e.*, their merits, but rather, they were affirmed based on the mere passage of time.

Section 921 of the LHWCA provides a substantive right to have an appeal to the BRB reviewed on the hearing record. Congress did not repeal this right, *i.e.*, it still exists for one year after an appeal is filed. Thus, it may be implied that Congress acknowledged the need for post-deprivation review, *i.e.*, due process, at the BRB for at least ***some*** period of time.

The Appropriations Act did not repeal this right; rather, it merely provided a discretionary right to the BRB to delay consideration of the appeal for one year and then affirm the appeal based upon the passage of time. Thus, Congress unintentionally created a ***discretionary right*** of review in the BRB, followed by a mandatory review by the circuit courts.

2. The Fifth Circuit Failed to Follow Its Precedent

In reviewing the need for procedural due process under the LHWCA, and recognizing the potential for an erroneous deprivation of property by administrative law judges, the Fifth Circuit has held that there is a "comprehensive system of review" provided by the LHWCA. This system consists of a full review on the merits by the BRB, followed by a review by the circuit court. *Abbott v. Louisiana Ins. Guar. Ass'n (In Re Compensation Under the Longshore and Harbor Workers' Compensation Act)*, 889 F.2d 626, 631 (5th Cir. 1989), *cert. denied*, *Louisiana Guar. Ass'n v. Abbott*, 494 U.S. 1082 (1990). In recognizing this right, the Fifth Circuit announced that "[t]here is little risk that the BRB and this Court would uphold an erroneous compensation order..." given the comprehensive system expressly provided for in the LHWCA. *Id.* at 632.[8]

Notwithstanding this recognition of a party's due process rights, and without providing any explanation, the Fifth Circuit panel deciding the instant appeals denied Shell's constitutional challenge in two brief paragraphs. Essentially,

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[8] The Fifth Circuit again acknowledged this comprehensive system of review in *Vincent v. Consolidated Operating Co.*, 17 F.3d 782, 786 (5th Cir. 1994)("The LHWCA provides the employer with a meaningful opportunity to be heard during the administrative process. The employer can request a pre-deprivation hearing before an administrative law judge, and can have the ALJ's compensation order ***reviewed by the [BRB]*** and then by this Court.")(emphasis added). Other courts also have recognized the "comprehensive system" of review provided by the LHWCA. *See Kreschollek v. Southern Stevedoring Co.*, 78 F.3d 868 (3d Cir. 1996); *Meehan Seaway Service Co. v. Director, Office of Workers' Compensation Programs*, 4 F.3d 633 (8th Cir. 1993).

the panel held that the mere allowance of a pre-deprivation hearing with an administrative law judge and a post-deprivation review by the circuit court satisfied all due process requirements. However, the panel ignored the Fifth Circuit's precedent on this very issue and, in so doing, failed to distinguish that precedent from these consolidated appeals.[9]

When requested to address this error on reconsideration, the Fifth Circuit panel chose not to do so. Thus, the panel assigned to these consolidated appeals, in essence, overruled a prior panel of the Fifth Circuit without an *en banc* decision. Ironically, the Fifth Circuit panel, in addressing one of the substantive issues on appeal, cited the well-established rule that "only an *en banc* court can overrule or change what a previous panel has held." *Shell Offshore Inc. v. Director, Office of Workers' Compensation Programs*, 122 F.3d 312, 316 (5th Cir. 1997) (citing *Wood v. U.S.*, 863 F.2d 417, 421 (5th Cir. 1989); *U.S. v. Nixon*, 827 F.2d 1019, 1023 (5th Cir. 1987)).

Therefore, this Honorable Court should grant this Petition for Writ of Certiorari to address whether there is, indeed, a "comprehensive system" of post-deprivation review under the LHWCA, whether such a system is required to satisfy a party's due process rights, and whether said rights were violated by Congress by the Appropriations Act.

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[9] The Fifth Circuit panel cited *Bunol v. George Engine Co.*, 996 F.2d 67, 69 (5th Cir. 1993), as improper authority in support of its ruling. The *Abbott*, *supra*, decision was issued ***prior to Bunol***. Thereafter, the *Vincent*, *supra*, decision reaffirmed the reasoning in *Abbott*, with *Vincent* being issued the year ***after Bunol***. Therefore, the Fifth Circuit panel's reliance on *Bunol*, *supra*, alone, was erroneous.

CONCLUSION

Shell respectfully suggests that the enforcement of the Appropriations Act, as concerns the LHWCA's right to a full review of all appeals by the BRB and circuit courts, warrants this Honorable Court's granting certiorari. By upholding the constitutionality of the Appropriations Act, the Fifth Circuit has sanctioned the taking of a property interest of Shell (*e.g.*, payment of compensation benefits) and has significantly hightenend the risk of erroneous deprivations of private interests by administrative law judges in the future.

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 96-60634, 96-60692

SHELL OFFSHORE, INC.,

Petitioner,

v.

DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR; Fernon Gilliam,

Respondents.

SHELL PIPE LINE CORP.,

Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR; Lee H. Cafiero,

Respondents.

September 24, 1997

Petitions for Review of the
Decision of the Benefits Review Board

Before KING, DUHÉ, and WIENER, Circuit Judges.

JOHN M. DUHÉ, JR., Circuit Judge:

BACKGROUND

These consolidated appeals present two issues: 1)whether the Omnibus Consolidated Rescissions and Appropriations Act of 1996 violates due process by automatically affirming claims older than one year as of September 12, 1996 and 2) what compensation, if any, two offshore workers are entitled to under the Longshore and Harbor Workers' Compensation Act. We find the Appropriations Act constitutional. We also affirm the compensation awarded to Gilliam and vacate and remand the issue of compensation due to Cafiero.

I. No. 96-60634

Fernon Gilliam ("Gilliam"), a lease operator for Shell Offshore, Inc. ("Shell") injured his back on a platform in the Gulf of Mexico. Gilliam reported his injury to his foreman, but he continued to work for the remainder of his seven-day shift. Gilliam returned to shore for a seven day leave. During this time, he sought no medical assistance although he still experienced back pain. When Gilliam returned to work, he completed another seven-day shift despite having trouble performing his normal duties. During his next week off, Gilliam still felt pain in his lower back, which intensified after he assembled a swing set for his granddaughter. Gilliam, however, returned to work for another seven-day shift, but again, he had trouble performing his normal duties. When Gilliam finished this shift, he went to the hospital.

In the course of his treatment, Gilliam consulted nine doctors. All agreed that Gilliam had suffered a back injury, but they disagreed as to whether the primary cause of the injury was the work-related accident or his assembly of the

swing set. Eventually, Gilliam filed for benefits under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), and he received a hearing before an Administrative Law Judge ("ALJ"). Based on the medical evidence, the ALJ concluded that the injury was compensable and awarded Gilliam benefits. Shell appealed to the Benefits Review Board ("BRB").

II. No. 96-60694

Lee Cafiero, a meter technician for Shell Pipe Line Corp. ("Shell"), injured his back by slipping on steps of a heliport. The parties stipulated that Cafiero's injury was work related, and Shell voluntarily paid benefits to Cafiero under two separate employee benefit plans, the Shell Disability Benefit Plan ("SDB Plan") and the Shell Disability Pension Plan ("SDP Plan").

Apparently unsatisfied with his benefits package, Cafiero claimed LHWCA benefits and received a hearing before an ALJ, who ordered Shell to pay Cafiero compensation benefits. Shell filed an appeal with the BRB.

III. The Appropriations Act

On September 12, 1996, the BRB affirmed the ALJ's decisions in the two cases pursuant to the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 101(e), 110 Stat. 1321 (1996)(the "Appropriations Act"). The Appropriations Act required, in part, that all claims pending before the BRB for over one year, as of September 12, 1996, be automatically affirmed.

Shell appealed both cases contending that: 1) the Appropriations Act violated Shell's Fifth Amendment due

process rights; 2) Gilliam's injury was the result of an independent, supervening cause which ended Shell's liability; 3) Cafiero waived his right to extra compensation by not filing a brief on the issue with this Court; 4) if Cafiero did not waive, then Shell deserved credit for the monies it had already paid to him; and 5) Cafiero's post injury wage earning capacity should have been based on the average of his reasonable salary range.

DISCUSSION

II. DUE PROCESS

In these consolidated appeals, Shell asserts that the provisions of the Appropriations Act automatically affirming the ALJs' decisions violate its Fifth Amendment right to due process. Thus, Shell asks this Court to declare the Appropriations Act unconstitutional. We disagree.

The essential element of due process is the right to notice and an opportunity to be heard "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal quotation marks omitted). Not only does the LHWCA as amended by the Appropriations Act afford Shell a full pre-deprivation, trial-type hearing before the ALJ, it also grants Shell a post-deprivation hearing in the Circuit Courts of Appeals. Accordingly, we conclude that Shell was not deprived of property without due process of law, and we affirm the constitutionality of the Appropriations Act. *See Bunol v. George Engine Co.*, 996 F.2d 67, 69 (5th Cir. 1993) (noting that where a party has had "an opportunity to be heard 'at a meaningful time and in a meaningful manner' before there was any government interference with its property rights[, its] rights to due process have been adequately protected").

II. GILLIAM'S COMPENSATION UNDER LHWCA

A. Standard of Review

This Court must affirm the ALJ' decision if it is in accordance with the law, is rational, and is supported by substantial evidence. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944 (5th Cir. 1991). Substantial evidence is evidence that "a reasonable mind might accept as adequate to support a conclusion." *Pierce v. Underwood*, 487 U.S. 552, 564-65 (1988) (internal quotation marks omitted).

B. Gilliam's Award

The LHWCA makes compensation payable when an employee suffers accidental injury or death arising out of and in the course of employment. *See* 33 U.S.C. § 903 (1984). If an employee shows that he was injured in a work-related accident, then he benefits from a presumption that the LHWCA covers his injury. *See* 33 U.S.C. § 920(a)(1927). The burden of proof then shifts to the employer to present substantial evidence rebutting the presumption that the claimant's injury was work-related. If the employer successfully rebuts the presumption, the ALJ must examine the evidence as a whole to determine whether the injury is work-related. Here, Gilliam produced evidence that he suffered a work-related injury. Shell argues that it produced substantial evidence to rebut the presumption because it showed that assembling the swing set, and not the work accident, proximately caused Gilliam's injury.

Generally, the idea of proximate cause, as applied in tort law, does not apply to the LHWCA. *See Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 1050 (5th Cir. 1983). With only a few exceptions, the court's function is at an end once causation in fact has been established. *Id.* One exception

does arise when the claimed injury has a supervening, independent cause. Here, Shell argues that assembling the swing set was just such a cause.

This Circuit has articulated somewhat different standards as to what constitutes supervening cause. *See Bludworth*, 700 F.2d at 1046 (noting the tension between two standards); *see also Atlantic Marine, Inc. v. Bruce*, 661 F.2d 898, 901 n.5 (5th Cir. 1981). While Shell urges this Court to hold that one standard has evolved into the second, controlling standard, the rule in this Circuit is that only an *en banc* court can overrule or change what a previous panel has held. *See Wood v. U.S.*, 863 F.2d 417, 421 (5th Cir. 1989); *U.S. v. Nixon*, 827 F.2d 1019,1023 (5th Cir. 1987). There have been no *en banc* holdings on this issue. We need not decide which standard is the operative one and we affirm Gilliam's award because the facts in this record do not meet either standard for supervening cause.

The initial standard was stated in *Voris v. Texas Employers Ins. Ass'n*, 190 F.2d 929 (5th Cir. 1951) which held that a supervening cause was an influence originating entirely outside of employment that overpowered and nullified the initial injury. *Voris* at 934. Here, assembling the swing set did not overpower and nullify the work-related injury. The ALJ found that the work-related accident caused the injury and that assembling the swing set only exacerbated the symptom. This finding is supported by substantial evidence.

Subsequently, in *Mississippi Coast Marine v. Bosarge*, 637 F.2d 994, 1000 (5th Cir. 1981) another panel held that a simple "worsening" could give rise to supervening cause. There, the court held that "[a] subsequent injury is compensable if it is the direct and natural result of a

compensable primary injury, as long as the subsequent progression of the condition is not shown to have been worsened by an independent cause." *Id.* at 1000. Here, Shell claims that under the worsening standard, it should not be held liable for Gilliam's injury. Gilliam did not need to seek medical aid until after he assembled the swing set. Moreover, assembling a swing set is not an every day activity but involves lifting, bending, and twisting; therefore, assembling the swing set worsened the injury and is a supervening cause. Contrary to Shell's argument, there is only weak evidence to suggest that assembling the swing set was a supervening cause. The evidence does show, though, that Gilliam was having trouble completing his normal work tasks even before he assembled the swing. Nor was assembling the swing an abnormal activity for one with back pain. The swing set was very light, only six feet high, and assembling it required little exertion. There is, therefore, substantial evidence to support the ALJ, and he is the fact finder, not this Court.

In the alternative, Shell argues that Gilliam's intentional misconduct is a supervening cause. Shell points to *Bludworth* which concerned a claimant who intentionally withheld a material fact from his treating physician. *Id.* at 1046. Shell argues that this case comes within *Bludworth* because Gilliam did not inform his first four doctors of the work accident. Rather, he told the doctors only about the swing set incident and blamed his pain on assembling it. Additionally, of the nine doctors who treated Gilliam, only the sixth knew about both incidents. Shell argues that, as a result, none of the remaining physicians could treat Gilliam properly.

We reject this argument. There is no evidence of intentional misconduct. The facts do not indicate that Gilliam intentionally withheld any information. Simple oversight is

equally likely. Further, there is no evidence that Gilliam's failure to inform all nine of his doctors of both incidents affected his treatment.

III. CAFIERO'S COMPENSATION UNDER LHWCA

Cafiero filed a brief in this Court only on the constitutional issue. As Shell has pointed out, there is authority within this Circuit that a party who inadequately briefs an issue waives the claim. *Villenueva v. CNA Ins. Cos.*, 868 F.2d 684, 687 n.5 (5th Cir. 1989); *Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir. 1994). In *CNA*, the insurance company raised an issue with this Court that had no statutory support; thus, there was no legal basis on which we could decide the issue. In *Cinel*, the appellant attempted to raise a new issue which had not been briefed. Again, this Court had no legal basis upon which to decide the issue.

Although Cafiero failed to brief the issues of his compensation as raised by Shell, we will decide the issues. Here, the rule does not apply because Cafiero has neither attempted to raise new issues nor raised an issue without sufficient statutory support. This case is similar to *Louisiana Landmarks Soc. v. City of New Orleans*, 85 F.3d 1119, 1122 n.3 (5th Cir. 1996) in which we noted that while the appellee had not argued an issue in its brief, we could still consider the issue since the appellant's brief had addressed it. "The policies . . .[of] avoid[ing] piecemeal litigation and conserv[ing] judicial resources . . .are less implicated when the party against whom waiver is asserted is the appellee." *Laitram Corp. v. NEC Corp.*, 115 F.3d 947, 954 (Fed. Cir. 1997). Cafiero is the Appellee and Shell, the Appellant, has briefed the issues; therefore, this Court may decide the issues on the merits.

A. THE ALJ'S GRANT OF CREDIT TO SHELL

1. *Standard of Review*

Shell urges this Court to consider whether the ALJ's grant of credit was proper as a matter of law. As such, it would be subject to *de novo* review. We conclude, however, that the resolution of this issue rests upon a factual dispute because the question is whether the half-pay that Shell paid Cafiero was an advance payment of compensation. Therefore, the standard of review is substantial evidence.

2. *The Merits*

The parties agree that Cafiero is entitled to LHWCA benefits, but Shell contends that it deserved a 100% credit for the full-pay and half-pay it paid Cafiero under the Shell Disability Benefits Plan ("SDB Plan").[1]

Section 914(j) of the LHWCA provides that "[i]f the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due." 33 U.S.C. § 914(j)(1984). The BRB has stated that "[I]f [the] employer paid the benefits and intended them as advance payments of compensation,[the] employer is entitled to a credit under Section 14(j)." *Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15, 21 (1986). The employer, however, is not entitled to a credit when it continues the employee's salary under a formal salary continuance plan unless it shows that these payments were intended to be advance payments of compensation. *See Fleetwood v. Newport News Shipbuilding and Dry Dock Co.*, 16 BRBS 282 (1984), *aff'd*, 776 F.2d 1225 (4th Cir. 1985).

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[1] Shell does not dispute on appeal the payments it made to Cafiero under the SDP Plan.

Here, the ALJ found that the SDB Plan provided an employee with 26 weeks of full-pay and 26 weeks of half-pay for an occupational disability regardless of length of employment. During the half-pay periods, disability benefits were to be reduced if the half pay plus any workers compensation totaled more than the worker's full pay. The ALJ found that Shell intended the 26 weeks of full-pay to be advance compensation within the meaning of Section 914(j). As a result, Shell would get full credit for monies paid during the full-pay period. The ALJ, however, found that the 26 weeks of half-pay were not advance compensation payments within Section 914(j). In coming to this conclusion, the ALJ relied upon the testimony of a Shell Human Resources representatives who stated that the half-wage payments under the SDB Plan were not intended to be advance compensation payments. Moreover, while the full-wage payments were to be offset by compensation payments, the SDB Plan stated that the half-wage payments were not to be so offset.

When the ALJ signed the order implementing this plan, however, he gave Shell credit for only two-thirds of the full-wage payments it made. The ALJ gave no explanation for this result despite the fact that it found Shell entitled to full credit for the full-wage payments. Because there is no factual support in the record for this result, we find there is no substantial evidence to support the two-thirds credit. Therefore, we modify the judgment to reflect Shell's entitlement to full credit for the full-wage payments and affirm.

As for the half-pay benefits, we affirm the ALJ's decision. We must affirm if the decision is supported by substantial evidence. Here, Shell's own employee testified that the half-wage payments were not intended as advance

compensation payments, and its SDB Plan states that the half-wage payments were not to be offset while the full-wage were. Shell argues that the ALJ's decision does not make sense because both the half- and full-pay benefits were coming from the same plan, the purpose of which was to compensate an injured employee. The law, however, states that the employer must intend the payment as an advance compensation payment. *Mijangos* 19 BRBS at 21. Shell submits that the only change in intent was the amount of benefits to be paid not the purpose for paying the benefits. Such a submission, however, is not strong enough to overcome the evidence of Shell's own employee who gave contrary testimony or the evidence of Shell's own plan which states that half-wages are not to be offset.

B. CAFIERO'S POST INJURY WAGE EARNING CAPACITY

1. *Standard of Review*

Although Shell again urges this Court to adopt a *de novo*standard, we decline because the issue is factual not legal. Here, the issue turns on whether substantial evidence supports the ALJ's finding that $35,000 was the correct wage earning capacity.

2. *The Merits*

The LHWCA provides that Cafiero's post-injury wage earning capacity should be fixed "as shall be reasonable." *See* 33 U.S.C. § 908(h)(1984). The BRB has held that an average of the range of salaries identified for suitable alternative employment is a reasonable method for determining a claimant's post-injury wage earning capacity. *See Abbot v. Louisiana Ins. Guaranty Ass'n*, 27 BRBS 192, 205 (1993).

Here, Cafiero previously had worked as an insurance salesman, and Shell presented uncontradicted evidence that his post-injury wage earning capability ranged form $35,000 to $50,000. Instead of choosing the average, as the BRB has held, the ALJ chose $35,000 as Cafiero's capacity. There is no explanation for this decision and we find no evidence in the record to support the ALJ's decision not to use the average of Cafiero's earning capacity. We vacate the decision and remand it to the ALJ for reconsideration consistent with this opinion.

CONCLUSION

For the foregoing reasons we AFFIRM in part and VACATE and REMAND in part.

APPENDIX B

U.S. Department of Labor
Benefits Review Board
800 K Street, N.W.
Washington, D.C. 20001-8001

Re: Lee H. Cafiero, Jr. v. Shell Pipe Line Corporation, Director, Office of Workers' Compensation Programs (Case No. 93-LHCA-0385) (OWCP No. 07-0118401) (BRB No. 94-2654)

NOTICE FROM THE CLERK OF THE BENEFITS REVIEW BOARD

Pursuant to the provision of Public Law 104-134 (Omnibus Appropriations for Fiscal Year 1996), enacted on April 26, 1996, appeals from decisions under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, which have been pending before the Benefits review Board for more than one year, shall, if not acted upon before September 12, 1996, be considered affirmed by the Board and shall be considered the final order of the Board for purposes of obtaining a review in the United States courts of appeal.

According to our records, the appeal in the instant case has now been pending at the Benefits Review Board for more than one year. Therefore, consistent with Public Law 104-134, this decision pending review by the Benefits Review Board is considered affirmed and shall be considered the final order of the Board for purposes of obtaining review in the United States courts of appeal. Attached please find an outline of the procedures for appealing to the courts of appeal.

DATE: SEP 12 1996

Sincerely,

/s/ Thomas O. Shepard Jr./P.F.
Thomas O. Shepard, Jr.
Clerk of the Board

[certificate of service omitted in printing]

APPENDIX C

U.S. Department of Labor
Benefits Review Board
800 K Street, N.W.
Washington, D.C. 20001-8001

Re: Fernon Gilliam v. Shell Offshore Inc., Director, Office of Workers' Compensation Programs (Case No. 90-LHCA-2589) (OWCP No. 07-0112227) (BRB No. 93-1758)

NOTICE FROM THE CLERK OF THE BENEFITS REVIEW BOARD

Pursuant to the provision of Public Law 104-134 (Omnibus Appropriations for Fiscal Year 1996), enacted on April 26, 1996, appeals from decisions under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, which have been pending before the Benefits review Board for more than one year, shall, if not acted upon before September 12, 1996, be considered affirmed by the Board and shall be considered the final order of the Board for purposes of obtaining a review in the United States courts of appeal.

According to our records, the appeal in the instant case has now been pending at the Benefits Review Board for more than one year. Therefore, consistent with Public Law 104-134, this decision pending review by the Benefits Review Board is considered affirmed and shall be considered the final order of the Board for purposes of obtaining review in the United States courts of appeal. Attached please find an outline of the procedures for appealing to the courts of appeal.

DATE: SEP 12 1996

Sincerely,

/s/ Thomas O. Shepard Jr./P.F.
Thomas O. Shepard, Jr.
Clerk of the Board

[certificate of service omitted in printing]

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-60634

SHELL PIPE LINE CORPORATION

Petitioner

v.

DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR; FERNON GILLIAM

Respondents

No. 96-60692

SHELL OFFSHORE, INC.

Petitioner

v.

LEE H. CAFIERO, DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR

Respondents

Petitions for Review of an Order
of the Benefits Review Board

FILED DEC 10 1997
CHARLES R. FULBRUGE III CLERK

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion September 24, 1997, 5 Cir., _____, _____ F.3d _____)

Before KING, DUHÉ and WIENER, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

/s/ John M. Duhé Jr.
United States Circuit Judge

Judge Jones did not participate in the consideration of the suggestion for rehearing en banc.